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632225—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 917

THE OHIO PUBLIC SERVICE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 330–354, 370–383) are reported in 52 N. L. R. B. 725. The court below wrote no opinion but its judgment (R. 475) is reported in 144 F. (2d) 252.

JURISDICTION

The judgment of the court below was entered on July 17, 1944 (R. 475). A petition for rehearing, filed by petitioner on August 4, 1944 (R. 477), was denied on November 6, 1944 (R.

485). The petition for a writ of certiorari was filed on February 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's findings that petitioner interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act, and that petitioner discouraged membership in a labor organization by discriminatorily discharging two of its employees, thereby violating Section 8 (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

Upon the usual proceedings, the Board, on September 18, 1943, issued its findings of fact, conclusions of law, and order (R. 330–354, 370–383). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[1]

Ben F. Thomas worked for petitioner as a guard during the month of February 1941, but because he was above the age prescribed for guards was laid off until another job could be found for him (R. 333–334; 60–61, 272). Thomas was reemployed in June 1941, and during an interview before he started work, Plant Superintendent McCormick (R. 333; 26, 268) remarked in derogatory terms that he hoped that Thomas did not belong to the CIO. Thomas replied that he had had to join as an incident to his employment since February. (R. 334; 62, 273–274.)

[1] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

In the summer of 1942, the International Brotherhood of Electrical Workers sent letters to petitioner's employees soliciting their membership (R. 334; 25–26). After that organization had approached employee Cornelius L. Yingling, he asked Superintendent McCormick what he thought about the letter (R. 334; 26). McCormick said that he was not allowed to express an opinion, but, during the course of the conversation, voiced the conviction that petitioner would, in the event that the men joined the union, withdraw such benefits as group insurance, eliminate paid vacations and sick leave pay, and change from a monthly to an hourly basis of compensation (R. 334–335, 371; 26–27).[2]

There was no further union activity at the plant until about January 30, 1943, when Yingling initiated the formation of the Union[3] (R. 335, 336, 377, note 11; 30–31, 32–33). Within a week, on February 6, the Union was formally organized and officers were selected (R. 336; 33–34, 64, 161). Yingling was elected financial secretary (R. 336; 30, 33) and Ben Thomas became president (R. 336; 30, 64).

On February 8, two days after their election as union officers, petitioner discharged Yingling

[2] Yingling testified that he understood McCormick's statement to have been an expression of a personal and not official opinion, and that McCormick's remark did not affect him in his "choice" (R. 371; 53).

[3] Local 267 of Utility Workers Organizing Committee, affiliated with the Congress of Industrial Organizations.

and Thomas (*infra*, pp. 5–12). Shortly thereafter, the Union requested a conference with petitioner to discuss a grievance on behalf of an employee (R. 371–372; 256–257, 174). A day or two later, on about February 13, petitioner's vice-president, E. J. Burger (R. 371; 247), called together several employees (R. 371; 173, 255). Burger announced that he had been approached "from the outside" by an individual seeking to speak for an employee about a grievance (R. 371; 257, 173). Expressing displeasure at having the employees represented by "someone else" when "in trouble," he assured the group that they and other fellows were free to submit their grievances directly to their superiors (R. 371–372; 257, 173).

The Board found that petitioner, by the foregoing statements, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7, thereby violating Section 8 (1) of the Act (R. 339–340, 371–372).

Cornelius L. Yingling had been in petitioner's employ for over eight years at the time of his discharge (R. 340; 25, 285). He was concededly a good worker (R. 340, 377, note 11; 291) and had received several promotions (R. 340, 377, note 11; 27–28). Yingling became the leading advocate of the Union and recruited most of its members, soliciting his fellow employees during, as well as outside of, working hours (R. 335, 336,

377–378; 30–31, 32–33, 63, 161). The organizational meeting of February 6, 1943, was held at his home (R. 336; 33–34, 64, 161). There he was elected financial secretary (R. 336; 33).

On February 8, the second working day after his election to office, Yingling was summoned to the plant from his home several hours before the start of his shift (R. 342; 34). Superintendent McCormick met him at the gate, handed him his wages together with a letter, announced that he was being released, and denied him access to the plant to obtain his engineer's license and clothes (R. 342–343; 34–37).

Petitioner defended the summary termination of Yingling's employment principally on the ground that he failed to report for work on the night of January 23, 1943 (R. 342; 413). At the hearing, but not in the letter of discharge, petitioner urged, as a contributory cause, an alleged listlessness and inattention to duty following Yingling's request for a release, in December 1942, to take a position with another company (R. 373–374; 291). The Board found that neither of these circumstances caused his discharge (R. 343–344, 372–374).

The material facts concerning Yingling's absence on the night of January 23, 1943, are as follows: Early in the afternoon of January 23, McCormick honored a request of Yingling's

father-in-law to relieve Yingling of his duties that night to permit his attendance at a supper party given by his father-in-law (R. 341, 372; 40–41, 286–287). Shortly thereafter, Yingling called McCormick to confirm the arrangements already made on his behalf (R. 341; 41). In the ensuing conversation, Yingling agreed that he would probably work the last part of his shift (R. 341; 41, 52). About four or five hours before the time at which Yingling stated he might report for work, petitioner's office manager, a guest at the party, informed McCormick by telephone that Yingling would not be able to work at all that night (R. 341; 41–42, 44–45, 53, 210–211, 288–289). McCormick did not object, and Yingling did not report for work (R. 341; 46, 53, 211, 289). In his absence, McCormick stood his shift (R. 341; 289). McCormick said nothing to Yingling about his absence until a few days had passed, at which time he remarked that there were few superintendents who would stand an employee's shift to enable him to attend a party (R. 342, 373, note 4; 46, 289–290). Yingling thanked McCormick for the favor and promised that it would not happen again (R. 373, note 4; 46). McCormick concluded the conversation with the comment, "all right, boy" and no further mention was made of the incident until Yingling was discharged two weeks later (R. 342, 372–373, note 4; 46, 290).

Aside from the bare assertion made for the first time at the hearing that he had become inattentive to his duties in minor ways, petitioner produced no evidence to establish its claim that Yingling grew listless at his work following his request for a release in December 1942 (R. 373; 291). Moreover, Yingling had never requested a release, but had merely explored with McCormick petitioner's attitude toward a change (R. 340; 38, 39). A few days later he informed McCormick of his decision to "stick" with petitioner and not to request a release (R. 341; 38–39, 290–291). Yingling was never reprimanded for such alleged listlessness, nor did petitioner mention it to him at the time of his discharge (R. 373–374; 28, 35–36, 413).

Ben F. Thomas was employed by petitioner as a storekeeper in June 1941 (R. 344; 61–62, 273). In that capacity he was required to keep records of supplies and to check in daily deliveries of materials to the plant (R. 345; 66–67, 94–95, 276–278). During the course of his employment, he handled some 400 or 500 shipments (R. 345, 374; 133–134). Thomas joined the Union on February 4, signing his membership card at the plant during working hours (R. 335, 378; 33, 63), and was elected president at the organizational meeting of February 6, 1943 (R. 344; 30, 64).

On February 8, 1943, almost simultaneously with Yingling's summary dismissal, Thomas was

also discharged (R. 344; 64, 65). The reason assigned to him by McCormick at the time was that petitioner's main office at Cleveland had been complaining about an error Thomas had made on January 2 (R. 375–376; 65). Before the Board, petitioner expanded its defense by contending that the discharge was caused by a history of incompetence and inefficiency. The Board rejected petitioner's contentions for want of merit and found that they failed to establish the real reason for the discharge (R. 349–350, 374–376).

The first incident complained of took place in December 1941, over a year before the discharge, and involved an overshipment of castings which Thomas checked in and signed for without weighing (R. 345–346; 94–97, 415, 416, 419). He was not reprimanded for the failure to weigh the castings before accepting delivery (R. 345, 374–375; 66).

In March 1942, Thomas discovered that a shipment of flexible cord he had accepted consisted of twice as much footage as the documents called for, and immediately reported that fact to the Cleveland office (R. 349; 453, 457, 118–123), which arranged to retain the excess (R. 349; 458). In this instance, the error had been made by the shipper in favor of petitioner and not by Thomas, who discovered and reported it. The Board found that Thomas was guilty of no dereliction in this respect (R. 374).

On December 26, 1942, a seller delivered two tanks of oxygen on a shipping memorandum listing two cylinders by number but containing an extended description for three cylinders (R. 347; 72, 279, 439). Thomas checked the tanks against the cylinder numbers listed and signed for them without noting the description (R. 347; 73, 279). He then made out and sent to the Cleveland office a requisition for two cylinders (R. 348; 441, 111). Toward the end of January, the Cleveland office questioned Thomas about the discrepancy between his requisiton and the invoice it had received from the shipper (R. 348; 114). Thomas promptly replied that he had received only two tanks and stated he would check with the driver who made the delivery the next time he came to the plant (R. 348; 447). On February 6, the day on which the driver was expected, Thomas was ill and did not report for work (R. 348; 129–130, 281). His substitute saw the reminder Thomas had made out to himself to check with the driver and reported that fact to McCormick (R. 348; 198–199, 281). After his discharge, Thomas succeeded in having the overcharge rectified, and the vendor issued petitioner a corrected invoice and a credit memorandum for $2.94 (R. 348; 115, 128-129, 449).

The incident of January 2, which McCormick gave Thomas as the sole reason for his discharge (*supra*, p. 9), involved a shipment of castings,

for which Thomas signed without ascertaining whether it consisted of 215 pieces, as designated in the documents (R. 346; 67, 427). A subsequent count by Thomas revealed a shortage of two pieces, and he noted that fact on the report which he sent to Cleveland (R. 346; 68, 435, Resp. Exh. 11). Although he thereafter attempted to confirm the shortage with the truck driver, Thomas was discharged before his efforts had succeeded (R. 346, 375, note 9; 70, 131). The Board found (R. 375, 376) that he had made a reasonable effort to check with the truck driver. Because of the triviality of the error, coupled with the fact that petitioner retained Thomas in its employ for five weeks thereafter, the Board refused to believe that this incident occasioned or contributed to his dismissal (R. 374–375).[4]

Petitioner contended that it was unaware of the union activity at the plant and of the leadership of Thomas and Yingling (R. 250, 270–271). The Board, however, found that the Union's organizational drive was a subject of general discussion at the plant, that McCormick was in constant touch with the employees, and that there was other evidence, to show that petitioner did

[4] Petitioner also alleges (Br. 30) that Thomas' failure to keep a complete record of safety equipment showed a negligent performance of his duties. The evidence, however, shows that the confused state of the record was not entirely attributable to Thomas (R. 93, 278–279). That petitioner did not regard this as serious is evident from its failure to reprimand him (R. 374–375; 63, 72).

have such knowledge (R. 376–378; 30–33, 63, 161, 162–163, 225–226).

Finally, the Board found that petitioner discouraged membership in the Union by its discriminatory discharge of Yingling and Thomas, thereby violating Section 8 (3) and (1) of the Act (R. 344, 350, 372). Its order directed petitioner to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to Yingling and Thomas, and to post appropriate notices (R. 381–382). Thereafter, petitioner filed a petition for review in the court below (R. 390–401), and the Board answered requesting enforcement (R. 402–406). On July 17, 1944, the court entered its decree (R. 475) enforcing the Board's order in full.

ARGUMENT

Petitioner's contention (Pet. 11, 13–14) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. The evidence summarized in the Statement affords full support for the challenged findings.

There is no merit to petitioner's contention (Pet. 12, 13; Br. 17, 18–19) that the statements of its officials were not violative of Section 8 (1) of the Act. Superintendent McCormick's statement that unionization would be followed by the loss of valuable benefits, and Vice-President Bur-

ger's advocacy of direct dealing with the individual employees were, in their context, clearly coercive. In view of McCormick's complete control over the hiring and discharging of employees (R. 333), the Board was correct in its conclusion that his statement to Yingling (*supra*, p. 4), even if understood to be an expression of personal opinion, was violative of Section 8 (1) of the Act (R. 371). The statements of petitioner's officials were considered by the Board "not in isolation but as part of a pattern of events adding up to the conclusion of [coercion] and interference." *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 539.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no question of general importance is involved. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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FEBRUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945